

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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UNITED STATES, et al., : Civil Action No.:
: 1:23-cv-108
Plaintiffs, :
versus : Friday, March 10, 2023
:
GOOGLE LLC, :
:
Defendant. :
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The above-entitled motions hearing was heard before
the Honorable Leonie M. Brinkema, United States District
Judge. This proceeding commenced at 10:10 a.m.

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P R O C E E D I N G S

THE DEPUTY CLERK: Civil Action 23-108, United States, et al. versus Google LLC.

Would counsel please note their appearances for the record.

MR. MENE: Good morning, Your Honor. Gerard Mene with the U.S. Attorney's Office. Your Honor, Aaron Teitelbaum and Julia Wood from the United States Department of Justice Antitrust Division are also here with me. Julia Wood will argue for the United States.

Your Honor, as you know, there are a number of co-plaintiff states. The Commonwealth of Virginia is here; they will introduce themselves shortly. But they will ask you for permission if they could also present a bit today as well.

THE COURT: I'm not sure we're going to need that, but I understand it. All right.

MR. MENE: Thank you, Your Honor.

THE COURT: So, Ms. Wood.

MS. WOOD: Good morning, Your Honor.

THE COURT: Good morning.

MS. WOOD: Julia Wood for the United States.

THE COURT: All right. Mr. Teitelbaum, you're ...

MR. FERGUSON: Andrew Ferguson for the Commonwealth and the other plaintiff states, Your Honor.

1 THE COURT: All right, Mr. Ferguson.

2 MR. TEITELBAUM: Aaron Teitelbaum for the United
3 States. Good morning, Your Honor.

4 THE COURT: Good morning. All right. And for the
5 defendant.

6 MR. MAHR: Good morning, Your Honor. Eric Mahr,
7 Freshfields Bruckhaus Deringer, for Google Incorporated.
8 I'm here with my colleague, Tyler Garrett, also from my
9 firm.

10 THE COURT: Good morning.

11 MR. MAHR: Good morning.

12 THE COURT: All right. We have two motions before
13 the Court. First is the motion to transfer this case to the
14 Southern District of New York where Judge Castel is
15 overseeing the multidistrict litigation, and then we also
16 have a motion to seal. So obviously we're going to address
17 the motion to transfer first.

18 We've had a chance to read your pleadings, so I
19 fully understand the issue here. This is a motion to
20 transfer under Section 1404 of the federal code, but there's
21 also the very interesting aspect of this case which is
22 rather unique, and that is that there are sort of special
23 consideration that Congress has certainly expressed in terms
24 of federal government antitrust litigation, which would seem
25 to be a significant factor that the Court has to consider

1 here.

2 But with a 1404 transfer motion, which of course
3 is always left to the discretion of the Court, the Court
4 first has to determine whether or not the case could be
5 heard in the transferee court, and there's no question this
6 case could be heard in the Southern District of New York,
7 and nobody's disputing that; correct?

8 MS. WOOD: That's correct, Your Honor.

9 THE COURT: And so then the Court looks at a
10 series of other factors and has to weigh those factors in
11 determining whether or not it's appropriate to transfer the
12 case. And the first factor, of course, is the weight that
13 one accords to the choice of forum by the plaintiff.

14 Now, this Court, in the *Pragmatus* case, has always
15 expressed a strong concern about forum shopping, because
16 although we have slipped slightly in rank -- and that's due
17 to COVID, not to the judges -- we are still one of the
18 fastest courts in the country in terms of resolving civil
19 cases and, frankly, I'm certainly pushing for us to go back
20 to Number 1. And that being the case, it is a concern when
21 we find that cases are filed here primarily because of
22 arguments about docket congestion in other courts and
23 because of the speed of the docket. So I'm sensitive to
24 that.

25 On the other hand, we do have the Commonwealth of

1 Virginia as one of the plaintiffs here, and this case does
2 involve, among other claims, that the Department of Defense
3 is an actual victim, and so there are some legitimate
4 connections between this case and this district, so that the
5 forum shopping concern that I might otherwise have I don't
6 feel is present here.

7 So that factor, because the plaintiff chose --
8 some of the plaintiffs -- and, of course, it's sort of
9 ironic that New York is a plaintiff in this case and would
10 rather litigate here than in its home jurisdiction, but I
11 think that that first factor weighs in favor of not granting
12 the transfer.

13 The second and third factors, in my view, are
14 absolutely neutral. That is, the convenience of the
15 witnesses and access to the witnesses and the convenience of
16 the parties. The distance between the Southern District of
17 New York and Washington, D.C. is, you know, basically, what,
18 a two- or three-hour train ride? A one-hour flight? You
19 know, both are major metropolitan areas with excellent
20 transportation. And you've got witnesses and parties from
21 all over the country, so I don't think that's a factor that
22 weighs in either direction.

23 So the real issue here is the fourth issue, and
24 that is in the interests of justice, which addresses issues
25 such as efficiency and also the concern about overlapping or

1 inconsistent decisions. And I'm certainly sensitive to
2 that.

3 Under normal circumstances, my practice would be
4 where there's ongoing related litigation, to transfer. But
5 this is not an ordinary situation. Because of the very
6 strong language and the public policy behind Section 1407(g)
7 of the MDL statute, which clearly shows that Congress felt
8 it was extremely important to allow a prioritization of this
9 type of litigation, and this court is the court that the
10 plaintiffs have chosen to litigate what is a very
11 significant antitrust case.

12 So having given you that preamble, I'll turn to
13 the defendant, it's your motion, and you've got the burden,
14 to see how you overcome what I think is a very strong
15 congressional statement as to how this matter should be
16 resolved. Okay.

17 MR. MAHR: Thank you, Your Honor.

18 I will start with that issue, but with your
19 indulgence, I'd like to go back and just make a couple
20 points on some of the earlier points that you made as well.

21 But on the 1407 issue, we don't contest that what
22 the plaintiffs spend most of their brief addressing, which
23 is the congressional decision that antitrust enforcement
24 cases by the federal government should not be involuntary
25 consolidated in MDLs under Section 1407(g). That's clear.

1 The problem is, they're fighting the wrong war under the
2 wrong statute. We are not seeking MDL transfer of the --
3 this case; we are not seeking consolidation of this case
4 under either 1407 or 1404, the statute that we're actually
5 moving under. We're seeking transfer under 1404.

6 In fact, the Department of Justice has run this --
7 or the federal government antitrust enforcers have run this
8 argument before in front of Judge Bates in the *Cephalon*
9 case. Exact same argument where the FTC in that case
10 argued, as plaintiffs do here, that in passing the MDL
11 statute, Congress expressed a strong public interest in
12 exempting government antisuits from involuntary
13 consolidation. And the argument went before Judge Bates and
14 goes here, that without consolidation, there are no judicial
15 efficiencies to gain.

16 Judge Bates, I think, correctly and strongly,
17 forcefully, rejected both parts of that argument. First, he
18 held that consolidation isn't the sole efficiency that's
19 associated with transfer under 1407. In fact, he wrote:
20 "The most compelling reason to grant this transfer, the need
21 to avoid the risk of inconsistent judgments, is entirely
22 independent from the prospect of consolidation." That
23 factor, the avoidance of inconsistent judgments and rulings,
24 is at the very heart of our motion.

25 And I think it's important to note, you'll recall

1 from our opening brief, we went through quite an effort with
2 charts and graphs and comparing language to show that this
3 case is exactly substantively identical to the cases that
4 have been pending before Judge Castel for 18 months now, and
5 there was not a word of the opposition contesting that.

6 So the question here is not whether the -- there's
7 a risk of inconsistent judgments or whether there is a risk
8 of two different judges in two different circuits handling
9 the same case, under the same legal theories, with the same
10 allegations, concerning the same Google products and
11 services, at the same time. That's contested. So the only
12 question is whether we do it twice and invite the risk of
13 inconsistent judgments, or we do it once.

14 And that takes me to the other two points I wanted
15 to make. The first was that convenience factors I don't
16 think are neutral in this case, because it's not a question,
17 as the plaintiffs present in their brief, of well, should we
18 do this case once in the Eastern District of Virginia or
19 once in the Southern District of New York? The Southern
20 District of New York litigation is happening. So it's a
21 question of do we do this once in the Southern District of
22 New York, or twice. Once in the Southern District of
23 New York and once in the Eastern District of Virginia.

24 And I think it's quite clear that the convenience
25 of the parties, the judicial system, and any third-party

1 witnesses are better served by trying these issues,
2 litigating these issues once. One set of depositions. One
3 set of document productions. One set of summary judgment
4 motions. And one, if it goes to trial, testimony at trial,
5 instead of doing that twice.

6 I think this also kind of speaks to the forum
7 shopping issue. Because the plaintiffs, first of all, I
8 think, in their brief admit to forum shopping. They admit
9 that they made "a purposeful decision to litigate in this
10 district." You've said -- you remarked that it's ironic
11 that the Southern District of New York is down here looking
12 for this court in order to delay -- avoid what they say is
13 the delay in Judge Castel's court, that he's not going fast
14 enough.

15 First of all, I would contest that he's not going
16 fast enough. Secondly, I would say, that's just the flip
17 side of saying we want the speed of the rocket docket.
18 Instead of saying we want to go fast in the Eastern District
19 of Virginia, they just say we don't want to go slow in the
20 Southern District of New York. Again, I think they're wrong
21 about the Southern District of New York, but I also think
22 that that's just a plea for the rocket docket.

23 And, secondly, I think they've been literally
24 forum shopping, literally window shopping, watching the
25 Southern District of New York case for 18 months. All these

1 cases were filed two years before the Department of Justice
2 took any action. And they clearly -- they've had access to
3 the initial disclosures that were only exchanged between the
4 parties, but apparently the plaintiffs in those cases shared
5 them with the Department of Justice.

6 They've been literally sitting in the well of the
7 courtroom watching Judge Castel handle argument on motions
8 to dismiss, dealing with the substantive issues. And
9 apparently, after 18 months, they decided, we don't like
10 this court as much, we want to try another judge, in another
11 court, in another circuit. And I think that's really the
12 essence of forum shopping. I think that's a question of
13 strategy, not urgency, here.

14 Two other points on the 1407 argument, Your Honor.
15 One is that with respect to 1407(g), Judge Bates made clear
16 also in *Cephalon* that the animating concerns there were
17 tag-along actions. The concern was -- and this used to be
18 the case not ten years ago -- that the Department of Justice
19 was the leader in filing antitrust cases, and then all kinds
20 of private cases would come along behind them with tag-along
21 cases and copycat complaints. And those could drag back the
22 speed with which the Department of Justice's case got
23 resolved.

24 This is the exact opposite case. Here, by
25 two years, the Department of Justice is the copycat

1 complaint, the tag-along action. And they're asking you to
2 risk inconsistent judgments, conflicting and overlapping
3 judgments, and to do damage to the judicial economy of the
4 entire -- the systemic concerns that animate the interests
5 of justice here so that they can leapfrog Judge Castel's
6 court where he's dealing with these same issues.

7 They cite for this this notion that the Court
8 should recognize a general policy exempting federal
9 antitrust actions. They cite the *United States v. National*
10 *City Lines*, a 1948 case. That case held, indeed, that forum
11 non conveniens, the common law doctrine, did not apply to
12 antitrust enforcement actions by the federal government.
13 The problem is, that same year 1948, 1404 was passed, and it
14 amended the judicial code to add 1404.

15 And the next year, 1949, in the same litigation,
16 the *National City Lines* case, the Supreme Court again
17 visited the issue of transfer of that case. And that time
18 they said now that we have 1404, it's clear that Congress
19 intended 1404 to reach federal government antitrust
20 enforcement actions like the one in that case and the one
21 before the bar here.

22 Finally, they raised the Venue Act, which we think
23 is just another red herring. Congress did, indeed, amend
24 1407(g) not to change anything with respect to the federal
25 government, but to add state enforcers to the carveout

1 against consolidation under the MDL statute.

2 I think, if anything, Congress's decision to amend
3 that other statute, 1407(g), but not to do anything with
4 respect to 1404, is more a reaffirmation that 1404 should
5 continue to be applied as it has been by this court for
6 decades in well-established law. Congress has paid more
7 attention to the transfer and the venue of antitrust
8 enforcement actions by state and federal governments in the
9 last 18 months than it has in decades, and it made the
10 decision, we're going to change the MDL statute, but we're
11 going to leave 1404 exactly as it has always been.

12 And that's with the knowledge that there are cases
13 like *Microsemi*, in this very court, where -- and *Cephalon*
14 and *Illumina/Grail* where antitrust enforcement actions
15 brought by the United States Department of Justice had been
16 transferred under 1404, and yet Congress didn't touch it.

17 I think that plaintiffs' suggestion that you
18 should transpose the intent expressed under 1407(g) on to
19 1404 is wrong and you should reject it.

20 THE COURT: All right. Ms. Wood, do you want to
21 respond?

22 MS. WOOD: Thank you, Your Honor.

23 I appreciate your opening comments, Your Honor,
24 and so I'll try to be as brief as possible. I just want to
25 highlight a few points from the United States' perspective.

1 And then my colleague, Solicitor General Ferguson, is also
2 here to represent the Commonwealth of Virginia briefly if
3 your -- if your Court would allow it.

4 A few brief points on behalf of the United States.
5 Forum selection is not forum shopping. The Government
6 plaintiffs in this action rightly made the valid and
7 appropriate choice to sue Google in this district in a case
8 that has nationwide impact. Google concedes both that venue
9 is proper here, as well as personal jurisdiction. There's
10 no question about that. Indeed, Google has a substantial
11 presence in this very district with the data center in
12 Loudoun, offices in Sterling and Reston, and 875 employees
13 that work in this district.

14 So there's no question that the type of conduct
15 here is completely different than what Your Honor found in
16 *Pragmatus* where inappropriate machinations led to forum
17 shopping. Here, the plaintiff is the Commonwealth of
18 Virginia, one of the plaintiffs at home in this forum, and
19 as Your Honor alluded to, federal agencies have been harmed
20 by Google's conduct in this district, which separates that
21 case, as well as the other cases cited by Google, in
22 numerous respects.

23 Second, I'd like to suggest here that this is not
24 an instance where a tie goes to the runner. This is a case
25 where Google, as the entity seeking transfer, has to meet

1 the heavy burden, particularly where the plaintiff is at
2 home and where there's a meaningful factual nexus to the
3 district.

4 Google has to meet a heavy burden to show that
5 it's materially more convenient for this court -- for this
6 case to be transferred to a different court. It is not
7 about whether Google would have chosen this forum for
8 itself, or even whether other districts might fare better.
9 It is a question of whether Google can demonstrate
10 overwhelming facts and circumstances that justify removing
11 plaintiffs' right to choose an appropriate forum for itself.

12 Google has not met that burden. They have not
13 shown that inconvenience would justify a transfer. They
14 have not shown that witnesses, documents or other evidence
15 will be unavailable if the case remains here.

16 Google does talk about the purported
17 inefficiencies of having this case litigated here while a
18 related case is litigated in New York. The Government
19 plaintiffs would offer, Your Honor, that those
20 inefficiencies run in both directions, and those should be
21 considered as well.

22 There would be significant inefficiencies for the
23 Government plaintiffs here to be required to litigate with
24 no fewer than 32 different plaintiff groups that are now
25 consolidated before the MDL in front of Judge Castel.

1 What Google is attempting to do is shift the
2 burden of those inefficiencies on behalf of the Government
3 plaintiffs. And we, again, maintain they have not met their
4 burden to do that, and, in any event, shifting of the
5 inefficiencies to the Government plaintiffs would very much
6 fly in the face of the congressional spirit of 1407(g).
7 Google should not be allowed to use 1404 to do what it
8 acknowledges it cannot do under 1407(g), which is to
9 transfer this action to New York.

10 On the question briefly, the arguments counsel
11 raised about this supposedly identical nature of this case
12 with the cases in New York, that is simply not factually
13 accurate. We concede fully that there are certainly an
14 underlying quantum of facts that relate to both cases, and
15 we don't deny that; however, there are meaningful
16 differences between the complaint here in this court and the
17 complaints that are proceeding before Judge Castel.

18 Obviously Judge Castel has multiple class actions
19 that will require class certification. The plaintiffs in
20 that case have not all had the benefit of an investigation
21 prior to filing of the complaint. And even with respect to
22 the Texas AG plaintiffs that are pursuing litigation in that
23 court, but may not ultimately remain there as we noted in
24 our papers, there are differences between the way that the
25 plaintiffs here have framed this complaint versus the way

1 the Texas AG plaintiffs have framed their complaint. There
2 are meaningful differences.

3 Furthermore, it is not just a question about the
4 delay that would ensue if this case were transferred to the
5 Southern District of New York and would be required to
6 litigate in parallel with dozens of private plaintiffs, it's
7 also about maintaining some modicum of control over the
8 litigation, and that was something that was recognized in
9 the 1968 legislative history, the 1407(g), where Congress
10 wrote that the Government should not be required to
11 "relinquish the control of a consolidated discovery
12 proceeding to a private plaintiff's attorney." And we
13 believe that's a factor that this Court should also
14 consider.

15 As to the question of whether we're somehow
16 leapfrogging. Your Honor, respectfully, if this is a
17 leapfrog, then I believe that's what Congress absolutely
18 intended when it passed 1407(g), and also when it reinforced
19 that policy choice in December of last year and extended
20 that exemption to apply to state AG plaintiffs as well.

21 The legislative history in December of 2022
22 provided "the bill eliminates delays, inefficiencies and
23 associated higher costs that states face enforcing the
24 antitrust laws under the current JPML process."

25 That was the purpose of the December statute, and

1 that was the purpose of the original statute in 1968. And
2 what Google tries to do here would fly in the face of that.

3 I would be remiss if I didn't say we certainly do
4 recognize that this case would add to this Court's full
5 docket. We're cognizant of the burden of a large nationwide
6 antitrust case, but we respectfully request the Court retain
7 jurisdiction, both in the interests of justice and to follow
8 the spirit of what Congress intended.

9 THE COURT: All right. Thank you.

10 Mr. Ferguson.

11 MS. WOOD: Thank you.

12 MR. FERGUSON: Good morning, Your Honor.

13 Andrew Ferguson for the Commonwealth and the plaintiff
14 states.

15 I just want to make one point about Congress's
16 recent amendment to Section 1407. My friend on the other
17 side I think is effectively arguing that 1407 isn't
18 implicated here because they're not asking for formal
19 consolidation under the MDL.

20 And I just want to propose that I think that
21 Congress's amendment to 1407 should balance in the way that
22 this Court calculates the interests of justice for
23 Section 1404. Because, effectively, what we have here is an
24 argument that's kind of like empty formalism where they say,
25 well, we should send it up to the Southern District of

1 New York, notwithstanding that the Commonwealth is trying to
2 litigate in the courts of its own state, so that it can be
3 coordinated alongside an MDL.

4 But as my colleague from the United States just
5 said, the whole point of the amendment to 1407 is to allow
6 the sovereigns, when they're enforcing the antitrust laws,
7 to enforce them more swiftly than MDLs often allow for, and
8 to retain control.

9 Even if we aren't formally consolidated with the
10 MDL in the Southern District of New York, we will have to
11 move at the pace of that MDL. We'll have to be at least
12 somewhat mindful and deferential to what the judge needs to
13 do with regard to private plaintiffs' schedules.

14 I just don't know what is left of Congress's
15 December amendment of 1407 if states can be required to
16 transfer their cases that they filed in the courts of their
17 home state to a state that has an MDL pending to go
18 alongside the MDL, but will get all the disadvantages that
19 Congress recognized can inhere in an MDL for the sovereign
20 when the sovereign is enforcing the antitrust laws, but none
21 of the benefits. Because we will be stuck in the Southern
22 District of New York for trial, whereas the MDL plaintiffs
23 can return to their home courts for the actual trial.

24 And so I think that's kind of the worst of all
25 worlds, where the Commonwealth is not going to be able to go

1 to trial in the courts of its home state, but is still going
2 to suffer all the disadvantages of the sovereign litigating
3 at an MDL pace.

4 Thank you, Your Honor.

5 THE COURT: Thank you. All right. Did Google
6 want to respond briefly to that?

7 MR. MAHR: Briefly, Your Honor.

8 First, on the statutory argument that my colleague
9 from Virginia argued, I think that this -- 1407, the recent
10 amendments, didn't change anything. There has always
11 existed, for the federal government, the federal
12 government's antitrust cases may not be consolidated in kind
13 of a cattle call by the JPML.

14 At the same time, for decades, Congress has left
15 open and the courts have exercised 1404 to say, all right,
16 well, they're not going to go over in a cattle call through
17 the JPML, but we are going to leave over 1404, because there
18 are critical interests of justice, like the avoidance of
19 overlapping and conflicting judgments, that are important,
20 and we want to leave that open for courts to manage their
21 dockets for the judiciary to avoid two trials, two appeals,
22 and the chaos that will arise from that.

23 THE COURT: But, you know, as a practical matter,
24 if this Court were to move ahead, and let's say we resolve
25 this case and there is a judgment, you don't think that that

1 judgment would dramatically affect what would happen in the
2 Southern District of New York? If, for example, we wind
3 up -- a jury hears this case and they find in favor of
4 Google, you don't think that that would have a huge impact
5 on what's going on in any other court that's looking at
6 these cases? Of course it would.

7 MR. MAHR: It could. It's only a one-way ratchet,
8 though, because if they find in favor of us, that's not
9 binding on any other court.

10 THE COURT: It's not binding, of course not. But,
11 I mean, courts are not, you know, blind as to what's going
12 on among their colleagues. Or the same way, if the
13 Government were to win.

14 I mean, again, I think it's a fascinating argument
15 that you've made. I am going to rule against you, I am
16 going to deny the motion to transfer, because I am satisfied
17 that there are just enough differences between this
18 complaint and the complaints that are pending in New York.

19 I'm also satisfied that the serious significant
20 policy concerns expressed by Congress in how they have
21 handled the MDL statute, 1407(g), that those factors are so
22 significantly involved in this case, that it is appropriate
23 that the Court exercise its discretion and keep the case
24 here.

25 Now, having said that -- and you can have a seat

1 for a second -- let me tell you about what to expect.

2 Neither side may be happy about this. I'm going to issue a
3 scheduling order today to get this case moving.

4 Now, my understanding is there's a ton of
5 discovery that's already occurred in this case. The
6 Government's been investigating this case for two years or
7 so. There was a discussion in your papers about, what,
8 2 million documents or pages that have been exchanged
9 already. Frankly, I think there have been more depositions
10 taken in this case than we would normally allow. I mean, in
11 other words, this case, in terms of the amount of prefilings
12 discovery, there's a whole lot that's been done, and,
13 therefore, I'm not convinced you need all that much more
14 time for discovery.

15 So we're issuing a scheduling order today. That
16 means you need to put your running shoes on. Even though I
17 don't know whether we're going to get a motion to dismiss,
18 because the defendant has a couple of weeks yet to file
19 their response. But I want to also tell both sides that I
20 am going to be very respectful of what Judge Castel has
21 already done. In fact, I'm planning to give him a phone
22 call today just as a courtesy to let him know that I've
23 denied the motion to transfer.

24 And to the extent that I find that I can live with
25 decisions that he's made, even though I might have done

1 something different, I'm very mindful of the concern about
2 judicial inefficiency, and I therefore don't expect Google
3 to file a motion -- if you do file a motion to dismiss,
4 don't repeat the same arguments that he has already
5 definitively resolved. I feel that that's something that I
6 will not be very favorably inclined to consider.

7 At the same time, I'm hoping that both sides --
8 and I think you will, you're good professionals -- will work
9 well together. I don't expect there to be long delay fights
10 about the electronic evidence. I mean, I was very concerned
11 when I read there's this delay. I think part of the problem
12 may be there's so many lawyers, both from private and state
13 sectors, that are holding things up like that. But, in this
14 district, we don't countenance those types of disputes. If
15 parties can't work it out, you'll get an order from the
16 magistrate judge.

17 And I believe, even though it looks -- I'm going
18 to have this case reassigned to Judge Anderson as the
19 magistrate judge to conduct discovery. He knows how to
20 crack the whip, and he will keep everybody in line. So I'm
21 hoping that we don't have a lot of discovery disputes. And,
22 frankly, is there much discovery left that you all need?

23 MS. WOOD: Your Honor, may we be heard?

24 THE COURT: Yes.

25 MS. WOOD: Thank you, Your Honor.

1 There is meaningful discovery that we do need in
2 the terms of refreshing a lot of the documents that were
3 produced. The documents have not proceeded fully up to the
4 filing of the complaint, so we do need additional documents.
5 And there is extensive third-party discovery that I think
6 both sides anticipate being important here.

7 I understand Your Honor's desire to issue a
8 scheduling order today. I know that we can also promptly
9 confer and see if we can reach an agreed-upon schedule if
10 Your Honor would prefer that. I know that's something the
11 parties have talked about doing at some point.

12 THE COURT: Well, this is where your local counsel
13 are going to be invaluable. Mr. Mene from the U.S.
14 Attorney's Office knows how we operate. And I, frankly,
15 don't know if defense counsel have someone who's practiced
16 here extensively in this court.

17 But, for example, you all requested to bring three
18 cell phones into court today. That doesn't happen in my
19 courtroom or in this court. And that suggests that perhaps
20 local counsel may not be as familiar with the nitty-gritty
21 practice in this court. So you need to make -- both sides
22 will make their lives much easier if you're fully familiar
23 with how we operate.

24 MS. WOOD: We have relied on Mr. Mene. We thank
25 him very much for his assistance.

1 THE COURT: All right.

2 MR. MAHR: Your Honor, if I may respond on your
3 question about discovery.

4 THE COURT: Yeah.

5 MR. MAHR: Discovery has been one way. The
6 Department of Justice has had years of discovery, including
7 third-party discoveries with subpoena power and CIDs and
8 document requests and interviews. Google has not. So there
9 is definitely a three-year advantage here to the Government.
10 We have not been able to go out and talk to third parties
11 about market definition about effects of the --

12 THE COURT: Well, what's been going on in the
13 New York case?

14 MR. MAHR: Third-party -- discovery just began in
15 January.

16 THE COURT: I thought -- who's taken all the
17 depositions?

18 MR. MAHR: Those are depositions that the
19 Department of Justice in the State of Texas took during
20 their investigation. They're investigative depositions.

21 THE COURT: You were not party to those?

22 MR. MAHR: We had to show up with our witnesses,
23 but we didn't get to choose who they talked to.

24 THE COURT: All right.

25 MR. MAHR: We didn't get to participate in their

1 third-party witnesses. The Texas investigation, for
2 example, had 60 third parties; we have had zero.

3 THE COURT: All right. Well, that's something
4 you'll have to work out with Judge Anderson. All right.

5 MR. MAHR: Well, I will kind of reinforce
6 Ms. Wood's request. We have been discussing, in the event
7 you denied the motion, a proposal to the Court, and we can
8 make it to Magistrate Judge Anderson if you'd like, that we
9 propose for moving forward, and we would like the
10 opportunity to do that.

11 THE COURT: I'll punt that issue to him. I'll
12 give him a call today, too, and let him know it's coming.
13 All right.

14 MR. MAHR: Thank you.

15 THE COURT: But be mindful of how we operate here.
16 All right. Again, this is a problem that, frankly, the
17 Government's going to have because you chose to be here, and
18 I'm not joking when I say you need to have your running
19 shoes on. All right.

20 MS. WOOD: Understood, Your Honor.

21 THE COURT: All right. You know, everything in
22 life is finite. We have a finite lifespan, we have all
23 sorts of limits, and I think the same thing applies to
24 litigation. You might like to take 50 depositions but,
25 guess what, you aren't going to get 50. You might like to

1 have, you know, a year and a half to complete discovery, but
2 you're not going to get that in this court. It forces
3 lawyers to have to focus with laser efficiency on what are
4 the core issues you need to get to resolve a case.

5 So having said that, the last matter I want to
6 just very briefly address is there is this pending motion to
7 seal. I just want to put, again, both sides on notice about
8 this. I would not normally have granted that motion to seal
9 if it came to me fresh, because I don't think just the names
10 alone of people, unless they work for the CIA or something
11 like that, is something that's appropriate to be sealed.
12 But Judge Castel did grant that. And, again, this is an
13 example of where if it's a close call, I'm going to go with
14 what he's already done to reduce this problem with
15 inefficiencies and with inconsistent rulings. I may not
16 always be able to agree with him. I would be surprised if
17 I'm unable to because he's a colleague, and he's an
18 experienced colleague. Nevertheless, I am going to grant
19 that motion.

20 But I want both sides to understand that I'm one
21 of the judges in this court that looks very seriously at my
22 obligation to make sure that court proceedings are
23 transparent. What you do in the exchange of discovery
24 before you come to court, if you want to mark things as
25 confidential, although I wish it wasn't done as much as it

1 is, sobeit, because we want to keep the discovery process
2 going. But the problem with overclassifying things as
3 confidential then creates this problem when parties go to
4 file things in open court and they have to use materials
5 that were during discovery marked as confidential, we get
6 into this long rigmarole about having to file motions to
7 seal or unseal, whatever.

8 If I find that parties have put a confidential
9 stamp on materials that really do not justify being sealed,
10 I'm getting to the point now where I just say you've lost
11 your right to seal anything. So I warn you to be careful
12 about what you initially mark as confidential.

13 But even more so, when the other side wants to
14 introduce some of that information in a public filing,
15 immediately agree to unseal it so there isn't a fight about
16 it. Because if I have to start reviewing in camera things
17 and I find that the seal is not appropriate, I'm not going
18 to spend my time on other matters, I will just unseal
19 everything. Okay. So I hope we can get off to a good start
20 in that respect.

21 All right. Are there any other matters I need to
22 address with this case at this time?

23 MS. WOOD: Not from the United States, Your Honor.

24 THE COURT: How about for the defense?

25 MR. MAHR: No, Your Honor.

1 THE COURT: All right. Very good. You're all
2 free to go.

3 MS. WOOD: Thank you, Your Honor.

4 (Proceedings adjourned at 10:44 a.m.)

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6 I certify that the foregoing is a true and accurate
7 transcription of my stenographic notes.

8 Stephanie Austin

9 Stephanie M. Austin, RPR, CRR